IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

DAVID LEE BERG,

Plaintiff,

v. NO. 1:94CV194-S-D

WEYERHAEUSER COMPANY,

Defendant.

OPINION

In this case, plaintiff charges that defendant discriminated against him in violation of the Americans with Disabilities Act (ADA) when it terminated his employment. This cause is presently before the court on defendant's motion for summary judgment.

FACTS

David Berg began his employment with Weyerhaeuser at its pulp and paper complex in Columbus in October, 1982. From this time through November of 1991, Berg held the position of a process specialist in the "coater" department. Berg's duties involved the operation of large machinery and the performance of numerous manual tasks. By Berg's own admission, his safety record for this period was poor, resulting in a one month leave of absence during which time Berg underwent drug counseling. Upon his return in January of 1991, Berg was placed on a contingency plan that required him to "sustain an excellent safety performance for the next three years."

On November 1, 1991, Berg was seriously injured when he was hit by a large roll of paper and propelled approximately 85 feet into some metal posts. The parties disagree as to who was at fault in causing the accident, although Weyerhaeuser asserts that Berg was the cause. Berg suffered two spinal fractures, a fracture of his left elbow, a fractured femur and heel, fractures of both wrists, a severed median nerve in his right hand, a bruised median nerve in his left hand, and the partial severance of his left little finger.

Berg endured numerous surgeries as a result of the accident, and following maximum medical recovery, his doctor diagnosed a 58% impairment to the body as a whole. During the course of Berg's recovery, his doctor allowed him to return to Weyerhaeuser on a temporary, light-duty basis. Berg then worked for three months before taking leave for further surgery. Following this recovery period, Berg again returned to work, this time to a clerical-type position in the company store room. Both parties understood that this arrangement was temporary until Berg reached maximum medical recovery.

Berg worked in the storeroom approximately eleven months, during which time he was released by his doctor as having reached maximum medical recovery. On March 11, 1994, Berg learned he had been discharged via the following letter:

> If you will recall, on the day of your injury, you were on a contingency plan because of your safety performance as well as some other items. Had the incident occurred and you had not been injured on that day, we would have terminated you for that violation.

> If the above situation did not exist, we have to face the facts that your doctor has declared you with a 58% disability rating and we have to act against that. Because of these restrictions, we have no job that you can perform the essential functions of.
>
> Because of your repeated marginal safety performance and failure to meet your contingency expectation, your employment is terminated as of March 11, 1994.

DISCUSSION

I.

The summary judgment standard is familiar and well settled. Summary judgment is appropriate only if the record reveals that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(c). The pleadings, depositions, admissions, answers to interrogatories, together with any affidavits, must demonstrate that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Federal Sav. and Loan Ins. V. Kralj, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the nonmoving party. Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). However, summary judgment is mandated after adequate discovery and upon proper motion against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

II.

The Americans with Disabilities Act prohibits discrimination against qualified, disabled employees on the basis of that individual's disability.[1] 42 U.S.C. § 12112(a). To state a prima facia case under the ADA, Berg must prove that (1) he suffers from a "disability"; (2) he is a "qualified individual"; and (3) he suffered an adverse employment action because of his disability. Stradley v. Lafourche Communications, 869 F. Supp. 442, 443 (E.D. La. 1994). On summary judgment, Berg need only show that there is a genuine issue of material fact on each of these elements. Chiari v. City of League City, 920 F.2d 311, 314-15 (5th Cir. 1991).[2]

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[1]Defendant argued strenuously that Berg was an employee at will and therefore the mandates of the ADA were inapplicable. However, Mississippi law is well established that while an employee at will can be discharged at the employee's pleasure for good cause, bad cause, or no cause at all, an employee may not be terminated for a reason "independently declared legally impermissible." Shaw v. Burchfield, 481 So.2d 247, 253 (Miss. 1985). See Mississippi Employment Sec. Comm'n v. Philadelphia Mun. Separate Sch. Dist., 437 So.2d 388, 397 (Miss. 1983). Berg's complaint alleges that Weyerhaeuser fired him in violation of a federal statute. Therefore, the employment at will doctrine can afford Weyerhaeuser no protection with regard to Berg's ADA claim.

Conversely, Plaintiff may not request relief based upon "employment for term" principles, because his complaint only alleged a violation of the ADA. Thus, any issues regarding Berg's employment status are not properly before this court.

[2]In seeking guidance for its decision, this court, as have many others, turns to cases decided under the Rehabilitation Act. That Act and the ADA are very similar, and courts frequently borrow precedent and analysis from one in interpreting the other. See, e.g., Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993), cert. denied, ____ U.S. ____, 114 S.Ct. 1386, 128 L.Ed. 2d 61 (1994). This is consistent with Congress' intent "that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA." Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 n.14 (5th Cir. 1995) (quoting 29 C.F.R. § 1630, App., § 1630.2(g)).

Within the context of the instant case, a disability is defined as "a physical...impairment that substantially limits one or more of the major life activities of such individual...." 42 U.S.C. § 12102(2). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The Fifth Circuit has noted that this listing is not exhaustive, and that "other major life activities could include lifting, reaching, sitting, or standing." Dutcher, 53 F.3d at 726 n.7 (citing 29 C.F.R. § 1630, Appendix to Part 1630--Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.2(1)).

Although Berg stated in his deposition testimony that he "can still function pretty much as a whole," it was the opinion of Dr. Crenshaw that Berg's injuries represented a 58% impairment to the body as a whole.[3] Furthermore, Dr. Crenshaw stated that Berg's future employment could not include any lifting, climbing of ladders, stooping, or repetitive use of his knees, arms, or hands. Such a restriction would exclude heavy or repetitive factory work, thereby limiting Berg to "semi-sedentary office...work." In applying the guidance provided by the Fifth Circuit in Dutcher, it is the court's opinion that Berg's presentation of Dr. Crenshaw's

[3]The court notes that for Berg's injury to satisfy the definitional requirements of the term "disability," Berg's total inability to work need not be shown. In fact, the opposite is true. If Berg's injury rendered him completely unable to perform in any workplace, he would not be a "qualified individual" and his claim would fall outside the scope of the ADA. 42 U.S.C. § 12111(8).

deposition testimony constituted an offer of evidence "on which a jury could find that this impairment substantially limited a major life activity." Id. at 726. See Coghlan v. H.J Heinz, 851 F. Supp. 808, 814 (N.D. Tex. 1994). Considering the evidence of Berg's multiple limitations in the light most favorable to the nonmoving party, the court finds that there is a genuine issue of material fact as to whether Berg's impairment rose to the level of a "disability" as construed within the scope of the ADA.

The second prong of this analysis must consider whether Berg is a "qualified individual" under the Act. A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment..." in question. 42 U.S.C. § 12111(8). When a disabled person cannot perform the essential functions of the job in question, the court must then consider whether a reasonable accommodation is warranted. School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.17 (1987). Although both Berg and Dr. Crenshaw admit that Berg cannot return to the coating position he originally held, it is unclear as to whether a reasonable accommodation is feasible. The statute provides that a "reasonable accommodation may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices,...and other similar accommodations for individuals with disabilities." 42 U.S.C. §12111(9).

Although Weyerhaeuser is not required to create a new position for Berg, a reasonable accommodation does include reassignment to a vacant position. Id. See Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1492 (M.D. Ala. 1994). Following Berg's return to work, Weyerhaeuser initially placed him in a clerical-type position. Berg conceded that the position was temporary, yet this did not relieve Weyerhaeuser of its duty to accommodate if a vacant position was available. Id. Weyerhaeuser must neither make fundamental or substantial modifications to its procedures, nor must it make accommodations that impose an "undue hardship" on its operations. 42 U.S.C. § 12111(10). See Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). However, the parties disagree and each have presented apparently credible evidence as to whether an accommodation of Berg's disability was possible, considering the feasibility of restructuring and the availability of an open position. When issues can be resolved properly only by a finder of fact because they may reasonably be resolved in favor of either party, summary judgment will not lie. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Berg raised a genuine issue of fact through his allegation that he sought a specific position within the company and that a vacancy potentially existed. See Bradley v. University of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 925 (5th Cir. 1993), cert. denied, ____ U.S. ____, 114 S.Ct. 1071, 127 L.Ed. 2d 389 (1994). Therefore, defendant's motion is not warranted with regard to the issue of Berg's classification as a "qualified individual."

The final consideration is whether Berg suffered an adverse employment action because of his disability. Weyerhaeuser contends that Berg was fired due to his poor safety record, yet Berg alleges that his termination was directly attributable to his disability. If Weyerhaeuser fired Berg on the basis of his prior safety violations, then such action would be permissible and the ADA would not be implicated. Furthermore, Weyerhaeuser should not be punished if the delay in terminating Berg was due to a good faith concern for his situation following the accident and resulting surgeries. However, this two and one-half year delay, coupled with the language of the termination letter which explicitly cited Berg's disability as a factor in the termination decision, again gives rise to questions as to which reasonable minds could differ. Anderson, 477 U.S. at 250-51. The court finds that Berg has satisfied his burden of presenting evidence that demonstrates a genuine issue of material fact. Therefore, summary judgment is inappropriate on this issue as well.

CONCLUSION

Having carefully considered the evidence, the argument of counsel, and the applicable law, the court is of the opinion that genuine issues of material fact exist as to each of the prima facia elements of plaintiff's claim, and defendant thereby is not entitled to a judgment as a matter of law.

An order in accordance with this opinion shall be issued.

This the _____ day of August, 1995.

CHIEF JUDGE